Case Comments

Dillon Revisited: Toward a Better Paradigm for Bystander Cases

I. INTRODUCTION

In 1968 *Dillon v. Legg*[1] established a new limit on liability for the emotional distress[2] suffered by a bystander as a result of witnessing the negligently caused injury of a family member. This decision was both heralded and criticized by the legal community.[3] Since its inception *Dillon* has been reinterpreted nearly every year by California lower courts.[4] As a result, the *Dillon* rule has taken on a different character.[5] Originally seen as a broad-reaching abrogation of the zone of danger rule,[6] *Dillon* now can be viewed as simply another halting step in the long search for a better rule to govern bystander liability.[7] The decision espoused an essentially mechanical rule that has failed because it retains traditional negligence elements arguably ill-suited for bystander liability. This Comment will explore the transformation of what was

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1. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

2. The term "emotional distress" is employed by most U.S. jurisdictions. The *Restatement (Second) of Torts* notes, however, that the terms "mental suffering, mental anguish, [and] mental or nervous shock" also may be utilized. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). This Comment will use the term "emotional distress" because the California courts have adopted that phrase. This Comment focuses only on California's treatment of "bystander" claims—claims that arise after the plaintiff witnesses the harm caused to a third person by the defendant. Situations falling under §§ 46, 312, or 313 of the *Restatement (Second) of Torts* are beyond the scope of this Comment.

3. *See, e.g.*, Note, *Recovery for Emotional Trauma and Consequent Physical Harm by Witnesses Not Within the Zone of Danger*, 18 AM. U.L. REV. 577 (1969); Recent Case, *Negligence—Physical Injury Caused by Emotional Trauma—Recovery Possible When Plaintiff Witnesses Accident in Which Her Infant Daughter Was Killed by Defendant's Negligent Act*, 73 DICK. L. REV. 350 (1969); Comment, *Bystander Recovery for Mental Distress*, 37 FORDHAM L. REV. 429 (1969); Comment, *A New Boundary for Zone of Peril*, 1969 U. ILL. L.F. 125 (1969); Comment, Dillon v. Legg: *Extension of Tort Liability in the Field of Mental Distress*, 4 U.S.F.L. REV. 116 (1969); Note, *Torts—Liability to Witnesses of Accidents*, 1969 WIS. L. REV. 661 (1969).

4. Molien v. Kaiser Found. Hosps., 27 Cal. 3d. 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 112, 139 Cal. Rptr. 97 (1977); Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980); Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980); Austin v. Regents of Univ. of Cal., 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (1979); Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978); Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978); Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977); Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976); Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975); Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974); Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973); Deboe v. Horn, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971); Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

5. *See infra* text accompanying notes 68–136.

6. *See, e.g.*, Comment, *A New Boundary for Zone of Peril*, 1969 U. ILL. L.F. 125, 131 (1969).

7. "In short, the history of the cases does not show the development of a logical rule but rather a series of changes and abandonments." Dillon v. Legg, 68 Cal. 2d 728, 746, 441 P.2d 912, 924, 69 Cal. Rptr. 72, 84 (1968). *Dillon* remains, nevertheless, the seminal case cited in most jurisdictions that have expanded the scope of bystander recovery. *See, e.g.*, Barnhill v. Davis, 300 N.W.2d 104, 106 (Iowa 1981).

intended to be an expansive rule into a rule belabored by restrictive requirements.[8] This Comment also will examine the policies adopted by cases applying the latter interpretation[9] and will propose an alternate procedure for adjudicating bystander claims.[10]

II. History of Emotional Distress in Bystander Situations

The issues confronted in *Dillon* are not novel. Courts and commentators frequently recognized the probable merit of claims for emotional distress resulting from the plaintiff's observation of tortious injury suffered by another,[11] but courts permitted recovery only in the narrowest circumstances.[12] *Dillon* purported to eliminate the begrudging attitude that the judiciary traditionally demonstrated toward bystander cases.[13] Certain obstacles to greater liability not overcome by previous courts, however, did not vanish with the *Dillon* court's desire to overcome them.

Initially, judicial fear of the courts' inability to evaluate evidence of causation and harm and to award a proper quantum of compensatory damages produced an absolute bar to bystander claims.[14] Courts also were concerned with discouraging fraudulent or frivolous actions.[15] These fears either diminished through advances in behavioral and physical science[16] or were tolerated as inherent in the judicial process.[17] The resolution of these problems presented little difficulty to those courts seeking to establish wider liability.[18]

Bystander liability, however, presents other difficulties that cannot be overcome so easily. If liability is to expand, a rational rule to determine a new limit on liability must first exist. Many courts are wary of ever broadening liability and object to what they perceive as the inherent inequity of burdening the defendant with damages for the emotional distress suffered by bystanders

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8. *See infra* text accompanying notes 68–136.

9. *Id.*

10. *See infra* text accompanying notes 137–41.

11. *See, e.g.*, Spade v. Lynn & B.R., 168 Mass. 285, 47 N.E. 88 (1897); F. BOHLEN, STUDIES IN THE LAW OF TORTS 287–90 (1926); T. COOLEY, THE LAW OF TORTS 26–29 (1907).

12. *See infra* text accompanying notes 20–35.

13. We see no good reason why the general rules of tort law . . . long applied to all other types of injury, should not govern the case now before us . . . . "The refusal to apply these general rules to actions of this particular kind of physical injury is nothing short of a denial of justice."

Dillon v. Legg, 68 Cal. 2d 728, 746, 441 P.2d 912, 924, 69 Cal. Rptr. 72, 84 (1968) (quoting from Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 277 (1921)).

14. *See, e.g.*, Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896). "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where damages must rest upon conjecture or speculation." *Id.* at 110, 45 N.E. at 354–55.

15. *Id.*

16. *See* Harvard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478, 478–82 (1956); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1258–62 (1971).

17. *See* Orlo v. Connecticut Co., 128 Conn. 231, 239, 21 A.2d 402, 405 (1941); Owens v. Liverpool Corp., [1939] 1 K.B. 394, 400.

18. For example, Prosser noted that "[a]ll these objections have been demolished many times, and it is threshing old straw to deal with them." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 327 (4th ed. 1971) (footnote omitted).

when he or she merely acts negligently.[19] Defining the limits of liability continues to present the most significant obstacle to reaching a rational rule.

A. *The Impact Rule*

The impact rule was the first standard adopted that recognized the merit of emotional distress and avoided unlimited liability. Recovery for emotional distress characterized as "pain and suffering" traditionally had been permitted as an element of damages in personal injury actions.[20] Recovery for emotional distress was dependent on the existence of physical injury, because absent physical injury that produced the emotional distress no action in negligence was possible.[21] Under the impact rule the plaintiff could maintain a cause of action if he could allege that the defendant's act produced some physical contact.[22] Even though the physical impact may have played no role in causing the emotional harm suffered, recovery nevertheless was permitted.[23] The sole purpose of requiring physical contact and requiring tangible evidence to substantiate the plaintiff's claim, although unrelated to the emotional distress, was to make feigning emotional distress more difficult.[24] Additionally, because the defendant was liable only if physical contact occurred, the circumstances required for emotional distress liability under the impact rule were nearly identical to the more conventional personal injury claim.[25] The foes of emotional distress liability could accept that compromise.

The impact rule represented the accepted standard in all leading industrial states in the early twentieth century.[26] The patent artificiality of an impact requirment even if that impact was unrelated to the emotional harm, however, led to the abandonment of the impact rule in England where it had originated.[27] Similarly, the American jurisdictions that had followed the British lead in establishing the impact rule gradually moved toward a more reasonable basis of liability.[28] Today the impact rule is followed in a dwindling minority of jurisdictions.[29]

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19. *See, e.g.*, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). Liability to bystanders "would put an unreasonable burden upon users of the highway . . . and enter a field that has no sensible or just stopping point." *Id.* at 613, 258 N.W. at 501.

20. *See* W. PROSSER, *supra* note 18, at 330.

21. *See, e.g.*, Keyes v. Minneapolis & St. Louis Ry. Co., 36 Minn. 290, 293, 30 N.W. 888, 889 (1886).

22. *See, e.g.*, Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697 (E.D. Ark. 1959); Morse v. Chesapeake & O. Ry. Co., 117 Ky. 11, 77 S.W. 361, 362 (1903).

23. The impact required has been reduced to an insignificant level in a number of cases. *See, e.g.*, Porter v. Delaware, L. & R. Co., 73 N.J.L. 405, 63 A. 860 (1906) (dust in eyes); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (smoke inhalation); Zelinski v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961) (jostling of occupants in automobile).

24. W. PROSSER, *supra* note 18, at 330.

25. *Id.*

26. *Id.* at 331.

27. Dulieu v. White, [1901] 2 K.B. 669, *overruling* Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888).

28. *See infra* text accompanying notes 30–35.

29. Florida (Butchikas v. Travelers' Indem. Co., 343 So. 2d 816 (Fla. 1977)); Georgia (Howard v. Bloodworth, 137 Ga. App. 478, 224 S.E.2d 122 (1976)); Illinois (Cutright v. City Nat'l Bank of Kankakee, 88 Ill. App. 3d 742, 410 N.E.2d 1142 (1980). *But see* Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 428 N.E.2d 596

B. *The Zone of Danger Rule*

The zone of danger rule eventually replaced the impact rule as the standard rule of liability.[30] This rule retained the logic of the impact rule and yet expanded liability. Thus, a bystander could recover for emotional distress if at the time of the injury to the third person he was within the area of physical risk engendered by the defendant.[31] The underlying assumption of this rule is that any emotional distress suffered can be attributed to fear for one's own safety, rather than a reaction to another's injury.[32]

Under this rule the defendant had no duty beyond avoidance of physical injury. Any greater liability was considered too extravagant in a world where unpleasant and potentially disturbing events occur with distressing regularity. *Waube v. Warrington*[33] represented the view of most jurisdictions when it addressed the issue of an independent duty to avoid emotional distress:

> The answer to this question cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended.[34]

Thus, an expansion beyond the zone of danger rule was unlikely absent a realignment in judicial and societal attitudes. Such a change eventually created a potentially broader scope of liability in *Dillon*.[35]

C. *Pre*-Dillon *Approach to Emotional Distress*—Amaya

Before *Dillon* California courts specifically rejected the impact rule in *Cook v. Maier*[36] and, instead, applied the zone of danger rule to bystander claims.[37] A critique of *Dillon* must begin with a discussion of the case it overruled, *Amaya v. Home Ice, Fuel & Supply Co.*[38] In *Amaya* the plaintiff mother observed the defendant's truck strike and kill her infant son. She alleged that she suffered shock attributable entirely to witnessing the death of her son, rather than fearing for her own safety. The plaintiff was given the opportunity to amend her complaint to allege the requisite fear for her own

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(1981) (rejecting impact rule in favor of *Dillon* rule)); Indiana (Elza v. Liberty Loan Corp., 426 N.E.2d 1302 (Ind. 1981) (dissenting to denial of transfer)); Kentucky (Louisville & N. R.R. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925)); and Missouri (McCardle v. George B. Peck Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915)).

30. *See* Comment, *Negligent Infliction of Emotional Distress: Keeping* Dillon *in Bounds*, 37 WASH. & LEE L. REV. 1235, 1237 (1980).

31. *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

32. Several states, including California, denied recovery if the plaintiff's emotional distress was due *solely* to fear for another's well-being. *See* Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 11 (1976).

33. 216 Wis. 603, 258 N.W. 497 (1935).

34. *Id.* at 613, 258 N.W. at 501.

35. *See infra* text accompanying notes 49–65.

36. 33 Cal. App. 2d 581, 92 P.2d 434 (1939).

37. *See* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

38. *Id.*

safety to conform with the zone of danger rule, but she declined.[39] As a result, the California Supreme Court was obliged to consider whether an independent duty to avoid infliction of emotional distress could be established. The majority, over a strong dissent, declined to recognize that duty,[40] basing its decision on "administrative and socioeconomic factors."[41]

Looking first at administrative concerns, the court confronted the problem of limiting liability by examining Dean Prosser's proposed guidelines:

> It is clear that the injury threatened or inflicted upon the third person must be a serious one, of a nature to cause severe shock to the plaintiff, and that the shock must result in physical harm. The action might well be confined to members of the immediate family, or perhaps to husband, wife, parent or child, to the exclusion of bystanders and remote relatives. As an additional safeguard, it has been said that the plaintiff must be present at the time of the accident, or at least that the shock be fairly contemporaneous with it.[42]

The majority challenged the potential results of the application of the Prosser guidelines:

> [W]hat if the plaintiff was honestly mistaken in believing the third person to be in danger or to be seriously injured? . . . [W]hat if the third person was the plaintiff's beloved niece or nephew, grandparent, fiance or lifelong friend, as dear to the plaintiff as her more immediate family? . . . [H]ow soon is "fairly contemporaneous"? What is the magic in the plantiff being "present"? Is the shock any less immediate if the mother does not know of the accident until the injured child is brought home? And what if the plaintiff is present at the scene but is nevertheless unaware of the danger of injury . . . until shortly after the accident has occurred?[43]

The court doubted that any limitation could be formulated that would apply fairly to future litigants and avoid the problems discussed above.[44] The court also expressed concern over the potential absence of probative evidence regarding the plaintiff's emotional condition.[45]

In considering the socioeconomic circumstances that supported its decision, the court balanced the utility of activities likely to produce emotional distress in bystanders against the interests of emotional tranquility.[46] It predicted that significant detrimental effects upon economic growth and the insurance system would result if liability were expanded to include persons not placed in physical danger:

> As the industrial society in which we live becomes still more complex and the use of the streets and highways and airways increases, a certain percentage of acci-

39. *Id.* at 298, 379 P.2d at 514, 29 Cal. Rptr. at 34. *See supra* note 32.
40. *Id.* at 309, 379 P.2d at 522, 29 Cal. Rptr. at 42.
41. *Id.* at 309–15, 379 P.2d at 522–25, Cal. Rptr. at 42–45.
42. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 182 (2d ed. 1955).
43. 59 Cal. 2d 295, 313, 379 P.2d 513, 523–24, 29 Cal. Rptr. 33, 43–44 (1963).
44. *Id.* at 313, 379 P.2d at 524, 29 Cal. Rptr. at 44.
45. *Id.* at 311–12, 379 P.2d at 523, 29 Cal. Rptr. at 43.
46. *Id.* at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.

> dents therefrom appears to become statistically inevitable. There will be losses, and our present system of insurance attempts to compensate for them . . . . But could that system—imperfect at best—adequately and fairly absorb the far-reaching extension of liability that would follow from judicial abrogation of the [zone of danger rule] . . . ?[47]

Although the court's criticisms of Prosser's guidelines were valid, and the fears expressed were significant, no justification existed for total denial of responsibility on the part of the defendant. The court inequitably allocated the costs of the defendant's activities to the plaintiff.[48] A better solution would have been a limitation on the predicted "far-reaching extension"; however, the court rejected the feasibility of any such limitation. Until a reasonable means of defining the scope of liability for bystander harm could be developed, the zone of danger rule appeared irreplaceable.

III. *DILLON*—A CHANGE IN THE LAW

The California Supreme Court had an opportunity to reexamine the bystander rule five years after *Amaya*. In *Dillon v. Legg*[49] a mother and daughter witnessed the death of another daughter who was struck by the defendant's automobile.[50] The facts illustrate the harshness resulting from the artificiality of the zone of danger rule. If the rule had been applied, recovery to the mother would have been denied. The evidence showed that the mother was positioned farther from the deceased than was her other daughter. Under the *Amaya* rule the daughter was within the zone of danger and so could maintain a cause of action. Since the mother was near but not within the area of physical risk,[51] however, she could not claim a cause of action. The *Dillon* majority rejected this result and declared that the facts demonstrated "the hopeless artificiality of the zone-of-danger rule."[52]

The *Dillon* majority perceived the fear of fraudulent claims as the primary obstacle to establishing an independent duty to bystanders.[53] The court cleared this hurdle by noting that emotional distress was a proper element of damages in traditional negligence actions and recently had become an interest protected from intentional infliction.[54] The court found no satisfactory difference between the possibilities for fraud in those cases and in bystander situations. In reality, the disparate treatment of bystanders resulted from the *Amaya* court's doubt that courts had the ability to limit liability.[55]

The *Dillon* court proposed limiting liability by examining "all the circum-

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47. *Id.*

48. If it is unjust to the defendant to make him bear the loss which he could not have foreseen, it is no less unjust to the plaintiff to make him bear a loss which he could not have foreseen and which is not even due to his own negligence, but to that of another.

Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 17 (1953).

49. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

50. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

51. *Id.* at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75.

52. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

53. *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.

54. *Id.* at 736–38, 441 P.2d at 917–19, 69 Cal. Rptr. at 77–79.

stances" of the event.[56] In essence, it proposed an *emotional* zone of danger, the limits of which would be set by the reasonably foreseeable consequences of the defendant's act.[57] This elastic test would avoid the exclusion of meritorious claims, a result criticized by *Amaya* as a probable consequence of utilizing Prosser's proposed guidelines.[58] Because the all the circumstances test would give little guidance to courts attempting to resolve the question of liability, the court returned to Prosser's guidelines and set forth the following three-prong test to assist other courts in determining the scope of bystander liability:

> (1) Whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it. (2) Whether the shock resulted from the sensory and contemporaneous observation of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether the plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship.[59]

The majority held that the facts in *Dillon*, as judged by these guidelines, constituted a prima facie case, but it declined to make any other conclusions.[60] The court gave no indication of the position it would take when the facts did not satisfy each guideline so clearly. The court left the determination of the lines of demarcation of the newly created zone of emotional danger to courts confronted by cases resting "upon facts more subtle than the compelling ones" in *Dillon*.[61] The court professed its faith in the judiciary's ability to reach just results through the application of the foreseeability test,[62] free from the artificiality of the zone of danger rule.

The dissent in *Dillon* correctly argued that fear of fraudulent claims did not present the "prime hypothesis" for the denial of liability.[63] Significant issues, the socioeconomic circumstances in *Amaya* and the policy considerations in *Waube*,[64] were implicit in the court's motivation to reject the zone of danger rule in favor of a rule of wider liability, but were poorly addressed by the majority. In *Dillon* the court was concerned more with reaching a just result for the Dillons than with constucting a legal mechanism courts could employ later in different fact situations.[65]

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55. *See supra* text accompanying notes 42–45.

56. 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968).

57. *Id.*

58. *See supra* text accompanying notes 42–44.

59. 68 Cal. 2d 728, 740–41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). Prosser apparently acknowledged *Amaya*'s criticisms of his proposed guidelines. The guideline concerning the plaintiff's presence was made optional and was clarified by the addition of the phrase "rather than follow when the plaintiff is informed of the whole matter at a later date." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 354 (3d ed. 1964). *Dillon* reflected this change.

60. 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968).

61. *Id.*

62. *Id.* at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

63. *Id.* at 751, 441 P.2d at 927, 69 Cal. Rptr. at 87 (Burke, J., dissenting).

64. *See supra* text accompanying notes 47–49 & 34.

65. The opinion of the Supreme Court of California in *Dillon v. Legg*, in which the traditional impact and zone-of-danger rules were discarded in favor of determining the worthiness of plaintiff's claims on

While the *Dillon* court acknowledged the need to limit liability,[66] it also envisioned liability in cases presenting facts different from those in *Dillon*. The later cases demonstrate, however, a stagnation of the law and an unduly narrow reading of *Dillon*. The California Supreme Court and appellate courts have shown little creativity and a great deal of hesitancy in applying the *Dillon* test.[67]

Dillon advocated the resolution of bystander claims by an examination of "all the circumstances."[68] This approach bore little resemblance to the traditional tort principles upon which it purportedly was based.[69] The rejection of the "hopeless artificiality" of *Amaya* left no substantive means of evaluating the merit of emotional distress claims. *Dillon* removed the formal test present in the *Amaya* zone of danger rule and replaced it with the nebulous test of liability under all the circumstances. This loss of formality was not mourned, because formality apparently was equated with artificiality.[70]

The California judiciary recognized the absence of any formality and acted quickly to supply it. In *Archibald v. Braverman*[71] the court of appeal relied exclusively upon the three guidelines in *Dillon* to resolve the plaintiff's claim. Without expressly indicating that all three guidelines were required for liability to ensue, the court nevertheless proceeded under that assumption.[72] No court after *Dillon*, including the supreme court, has applied the all the circumstances test in a bystander context.[73] No significant reliance on the principle of foreseeability has developed either. Instead, courts have looked only to the *Dillon* guidelines in weighing the foreseeability of the plaintiff's emotional distress and thus have established an undeniably formal means to adjudicate claims similar to that in *Dillon*.

Although the courts have failed to apply the all the circumstances test, neither commentators nor the judiciary has criticized this divergence.[74] Both

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a case by case basis, deserves to be enshrined as one of the great examples in our law of a court abandoning decision-by-rule in the name of social justice.

Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 517 (1976).

66. 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).

67. *See, e.g.*, Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974).

68. 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968).

69. *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84. *But see* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

70. *See, e.g.*, Note, *A Mother Witnessing the Negligent Injury of Her Child May Recover for Her Emotional Distress Even Though She Was in No Personal Danger*, 47 TEX. L. REV. 518, 521 (1968).

71. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

72. *Id.* at 255, 79 Cal. Rptr. at 724.

73. In Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980), the California Supreme Court applied an all the circumstances test to a nonbystander situation. The court rejected the defendant's contention that all three circumstances were required to establish a cause of action based on *Dillon*. Although the court held that *Dillon* did not apply to the facts of the case, it deemed the *Dillon* foreseeability test as relevant. The court noted that "rote application" of the guidelines was contrary to the case by case method advocated by *Dillon*. Despite this apparent condemnation of a strict construction of *Dillon*, the first court of appeal bystander case after *Molien*, Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980), used the three guidelines like an absolute test. The appellate court concluded that the three guideline rule of *Dillon* remained intact for true bystander claims.

74. *See* Joseph, *Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injury to Actions Based on Strict Liability in Tort*, 18 DUQ. L. REV. 1, 26 (1979).

apparently have accepted the need to provide a formal framework for adjudication. As one commentator indicates:

> The most basic limit of adjudication is that it requires substantive rules of sufficient specificity to support orderly and rational argument on the question of liability. . . . We are rapidly approaching the day when liability will be determined routinely on a case by case, "under all the circumstances" basis, with decision makers (often juries) guided only by the broadest of general principles.[75]

The application of the *Dillon* rule illustrates certain hazards that accompany an extensive abrogation of a prior rule of law. The rejection of unreasonably artificial rules in the law should be encouraged; however, undoubtedly a need exists for formal rules of liability to provide a framework of analysis and adjudication. Lawyers need the assistance of formal rules to advise clients and plan trial strategy; judges must have a means to control the trial process; most importantly, members of society should have some means to predict the legal consequences of their actions. Without the presence of formality in the process, none of these needs can be satisfied regularly. The cases arising after *Dillon* are successful in this regard. These cases, however, have not presented the ideal rules. The following sections will examine the *Dillon* rule by focusing on the policy decisions underlying it.

IV. POST-*DILLON* ANALYSES

A. *The Need for Physical Manifestation*

Originally, *Dillon* required some physical manifestation of the plaintiff's emotional distress,[76] a requirement it retained from the *Amaya* zone of danger rule.[77] The courts interpreting *Dillon* have given little attention to this requirement; most opinions concern the application of the three *Dillon* guidelines.[78] Recently, this requirement was expressly eliminated by *Molien v. Kaiser Foundation Hospitals*.[79]

The original purpose of the physical manifestations requirement was identical to that of the impact requirement of the impact rule: validation of the authenticity of plaintiff's claim.[80] Like the impact of the impact rule, however, the physical manifestations that result are not exhaustive of all symptoms of serious emotional distress. Because of recent advances in medical science, the law should attempt to reformulate the definition of compensable emotional distress.[81]

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75. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976).

76. 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

77. 59 Cal. 2d 295, 299, 379 P.2d 513, 514, 29 Cal. Rptr. 33, 34 (1963).

78. Krouse v. Graham, 19 Cal. 3d 59, 75–78, 562 P.2d 1022, 1030–31, 137 Cal. Rptr. 863, 871–72 (1977), contains some discussion of this issue, but no attempt is made to define its meaning.

79. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

80. *See supra* text acompanying notes 23–24.

81. *See* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 305–06 (1944).

Tragic events may elicit a two-stage response from a witness.[82] An individual's primary response is essentially an automatic reaction that acts as a defense mechanism to shield him from the event.[83] Reactions such as fear, anger, grief, or shock exemplify primary responses. The response may be trivial or substantial, depending on the psychological and physical makeup of the individual and the nature of the traumatic event.[84] Because this reaction is generally short-lived and because it cannot be substantiated with objective criteria, it is seldom the basis for recovery.[85] Not every individual who suffers a primary response will encounter a secondary response.[86] The secondary response results from the individual's inability to adjust to a traumatic event.[87] Unlike the primary response, the secondary response generally is longer in duration and more amenable to objective verification. The three types of secondary responses are (1) anxiety responses—reactions characterized by anxiety and nervousness, gastrointestinal symptoms, cardiovascular symptoms, genito-urinary symptoms, fatigue, weakness, headaches, and backaches; (2) conversion responses—emotional reactions translated into physical ailments such as paralysis and limited use of limbs of the body; and (3) hypochondrial reactions—attitudinal changes unaccompanied by physical symptoms and characterized by an obsessive concern for one's own health.[88] An element of objective criteria, although not necessarily a physical manifestation, is common in all three responses.

After *Dillon* courts gave little attention to the issue of permissible physical manifestation.[89] The plaintiff merely had to allege some physical harm to make a sufficient complaint. *Molien* expressly rejected this requirement, arguing that no valid line could be drawn between the physical and the psychological; thus the plaintiff had to prove only the severity of his distress.[90]

When first announced the requirement of physical manifestation was a proper limitation. It verified the severity of the emotional distress when medical science had not yet achieved sufficient sophistication to accomplish the task. With a better understanding of emotional responses, this need to show physical manifestation should diminish.[91] The secondary responses

82. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1249 (1971).

83. *Id.*

84. *Id.* at 1252.

85. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 436A comment c (1965).

86. *See* Smith & Soloman, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 123 (1943).

87. *See* Comment, *supra* note 82, at 1249.

88. Laughlin, *The Neuroses Following Trauma*, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY ¶ 1301, at 104–08 (Cantor 1962).

89. *See, e.g.*, Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973). But see Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977), in which the court examined the causation of the physical injury.

90. 27 Cal. 3d 916, 929–30, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

91. *See* Comment, *supra* note 82, at 1260.

basically are capable of objective verification. Thus, consistent with *Molien*, the issue should be one of proof that utilizes objective criteria.

Once the court acknowledges that the issue is one of proof of emotional distress, it then must determine the type or degree of emotional distress that the law will recognize. *Molien* held that "some guarantee of genuineness" of the evidence given should be required to sustain a claim.[92] The court, however, was addressing only the issue of the evidence necessary to avoid a demurrer. Courts must set a standard that allows the fact finder to distinguish between compensable and noncompensable emotional distress.

The *Restatement (Second) of Torts* suggests a possible starting point to begin this analysis. The following comment attempts to define actionable emotional distress:

> It is only when it is extreme that liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people. The law intervenes only when the distress is *so severe that no reasonable man could be expected to endure it.*[93]

The comment clearly coincides with the distinction between primary and secondary responses. Lasting emotional distress should be actionable. The important distinction between *Molien* and the approach suggested by the *Restatement (Second) of Torts* is the addition of the legal concept of the reasonable person. Although not accordant with medical science, which does not acknowledge a typical response to stressful events, courts must add a reasonableness standard if bystander cases are to be adjudicated consistently.[94] The addition of a reasonable man standard provides a theoretical underpinning to the test. Not all emotional distress is actionable; only emotional distress which is so extreme that a reasonable individual would not be expected to endure it will support a claim. Thus, severity is to be defined in legal, not medical, terms. The fact finder will be responsible for determining whether the particular emotional distress is beyond that which reasonable men would be expected to endure.

B. *The Relationship Guideline*

The *Dillon* opinion begins with an illustration of the court's attitude toward the issue of bystander recovery: "That the courts should allow recovery to a mother who suffers emotional distress and physical injury from witnessing the infliction of death or injury to her child for which the tortfeasor is liable in negligence would appear to be a compelling proposition."[95] The motivation to extend liability stems not merely from a sense of legal obliga-

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92. 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980) (quoting Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970)).

93. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) (emphasis added). *Accord* D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975).

94. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 149–50 (4th ed. 1971).

95. 68 Cal. 2d 728, 730, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968).

tion, but from a notion of natural justice.[96] Although *Dillon* accords examination of the relationship between the plaintiff and the injured party as much weight as other guidelines,[97] the degree of attachment is tied inexorably to any resulting emotional distress.[98]

In interpreting *Dillon*, courts and commentators have encountered little difficulty in determining those relationships necessary to sustain recovery.[99] Compared with the other two guidelines, the issue of relationship presents the least complicated determination. This relative simplicity may account for the ease with which courts have defined the scope of this guideline.

Courts must be cognizant of the importance of the relationship issue when determining the scope of this guideline. Every effort should be made to prevent the inclusion of distant relationships and the exclusion of judicially unrecognized but close relationships. For the most part, the California courts have successfully struck a balance. The bulk of the cases confronted have contained spousal, parental, or sibling relationships.[100] No challenge has been made to the inclusion of these relationships; they are deemed sufficiently close to merit a cause of action.

Only two cases dealt with the application of the relationship guideline to nontraditional relationships.[101] In *Mobaldi v. Board of Regents*[102] the plaintiff was the foster mother of a three year old child killed by the defendant's negligent injection of an improper intravenous solution.[103] The court of appeal rejected reliance on the presence or absence of a strictly legal relationship as determinative of the limits of the guideline, holding that "[t]he emotional attachments of the family relationship and not legal status are those which are relevant."[104]

The *Mobaldi* court relied on a "logic of the close relationship" test and found that the child had been with the foster family from the age of five months and had treated the plaintiff as his true mother; thus the relationship

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96. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

97. *See supra* text accompanying note 59.

98. One court has stated that the emotional relationship is the most important of the *Dillon* guidelines:

> Personal relationship may link people together more tightly, if less tangibly, than any mere physical or chronological proximity . . . . Thus, where a mother witnesses the death of her child, it is only reasonable that the parameters of liablity established by the zone of physical danger be bent to accommodate the overwhelming impact of the mother's and child's mental and emotional relationship. Anything less would be to deny psychological reality.

D'Ambra v. United States, 114 R.I. 643, 656–57, 338 A.2d 524, 531 (1975).

99. Very little discussion has addressed this guideline. The only cases presenting it as a major issue are *Mobaldi* and *Drew*. *See infra* text accompanying notes 101–07.

100. *See, e.g.*, Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (plaintiff-husband; victim-wife); Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978) (plaintiffs-father, mother, children; victims-other children); Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974) (plaintiff-mother; victim-daughter).

101. Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977), concerned a guardian ad litem who claimed emotional distress resulting from the injury to her ward. This issue was not discussed in the opinion because the court denied a cause of action on other grounds. *Id.* at 949, 137 Cal. Rptr. at 627.

102. 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

103. *Id.* at 578, 127 Cal. Rptr. at 723.

104. *Id.* at 582, 127 Cal. Rptr. at 726.

possessed "all the incidents of parent and child except those flowing as a matter of law."[105] *Mobaldi* demonstrates the proper approach to the relationship guideline: courts should look to the substance of the relationship rather than its form.

If *Mobaldi* represents a proper application of the relationship guideline, then *Drew v. Drake*[106] stands as an improper approach. Criticism of the decision does not stem from the *Drew* court's denial of recovery based on a cohabitive relationship, but instead originates from the manner in which the decision was reached. Although the plaintiff and the deceased lived together for three years as "de facto spouses," the court denied a cause of action because it found that the relationship was not sufficiently close.[107] The court did not evaluate the intimacy of the relationship except by reference to the absence of any legal relationship between the parties. The summary rejection of the relationship as remote and unexpected, without further discussion, is objectionable. The court ultimately may have been correct in finding the relationship inappropriate to sustain a cause of action, but reliance on mere legal status does not provide a rational basis to reach that conclusion.

Nonetheless, the legal status of the parties cannot be ignored. Society assumes that a substantial degree of intimacy is present in legally recognized relationships. Accordingly, a rebuttable presumption should operate in the plaintiff's favor when such a relationship exists. The defendant could overcome that presumption by presenting evidence of a lack of actual intimacy between the parties at the time of the accident. Conversely, in the absence of a legally recognized relationship the plaintiff should be given the opportunity to introduce evidence on the nature of the relationship.[108] Above all, courts should recognize that the form of the relationship should not override its substance.

C. *The Observation and Location Guideline*

The observation guideline (which interrelates with the location guideline) consists of three distinct elements: (1) What was observed? (2) How was it observed? (3) When was it observed? Courts have been fairly successful in determining how the observation must take place, but they have not demonstrated equal skill in defining the other two elements of the test. This Comment will challenge the judicial definition of the proper subject of observation. Additionally, it will show that under the current application of the *Dillon* rule no need exists to require a time element in the evaluation of the plaintiff's observation.

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105. *Id.* at 583, 127 Cal. Rptr. at 726.

106. 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980).

107. *Id.* at 557, 168 Cal. Rptr. at 66.

108. For example, if the defendant could demonstrate that the plaintiff and the victim, although married, had been separated for four years, then that fact, not the legal status of the parties, should carry the greatest significance in determining the sufficiency of the relationship for emotional distress purposes.

1. *The Manner of Observation: How was it observed?*

If the relationship between the parties provides an emotional attachment, then the observation of harm to one of the parties places strain on that attachment.[109] Observation is the conduit that brings the unpleasant event into the plaintiff's consciousness. The more direct the impression, the more severe the emotional injury.[110] The *Dillon* court required sensory observation, a direct means of perceiving the event, in contrast to a subsequent recital of the facts by a third person.[111]

The courts have not required a visual observation in all cases, but have provided an exception for constructive observation. Constructive observation is the mental process by which the plaintiff realizes, without visual observation of the event, that harm has come to the third person. The California Supreme Court adopted this position in *Krouse v. Graham*.[112] The plaintiff knew his wife's position at the rear door of his car and he also saw the defendant's car approaching at a high rate of speed. Even though he did not see his wife killed, the court concluded that he was a percipient witness to the event.[113] The courts have successfully avoided an inflexible rule by focusing on the direct nature of the cognition, rather than the mechanics of its perception. This development is the only positive result of the interpretation of this guideline.

2. *The Subject of Observation: What was observed?*

An issue raised early in the post-*Dillon* cases concerned the subject of the plaintiff's observation. The *Dillon* court failed to clarify whether observation meant witnessing the tortious act, its results, or both. It spoke only of "observation of the *accident*,"[114] an imprecise term that could mean either event or both. The facts in *Dillon* presented simultaneous tortious conduct and resulting harm, thus there was no need for the court to define the subject of observation. When later cases arose, however, the courts were forced to define the term.

In *Jansen v. Children's Hospital Medical Center*[115] the plaintiff raised the issue of the proper subject of observation. She had witnessed the slow deterioration and death of her daughter, which she alleged was due to malpractice. The plaintiff contended that observation of the results was the

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109. "No loss is greater than the loss of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure." Portee v. Jaffee, 84 N.J. 88, 97, 417 A.2d 521, 526 (1980).

110. *See* Laughlin, *The Neuroses Following Trauma*, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY ¶ 1301, at 104–08 (Cantor 1962).

111. *See supra* text accompanying note 59.

112. 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

113. *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

114. 68 Cal. 2d 728, 741, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (emphasis added).

115. 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973).

essence of the second *Dillon* guideline.[116] The court of appeal rejected this formulation of *Dillon*, ruling that the injury-producing event itself must be observed and the event must be of a sudden and brief nature capable of sensory perception.[117]

The *Jansen* position required some means of distinguishing *Archibald v. Braverman*,[118] which permitted recovery when the plaintiff arrived on the scene after the event.[119] The court solved this dilemma by inferring that the plaintiff heard the explosion that caused the injury, thus meeting the requirement of observing the injury-producing event.[120] The court's position, however, is erroneous. The event that affects the plaintiff's emotional distress is not the act, but the results of that act. This position was accepted implicitly in *Archibald* and was adopted expressly in *Mobaldi*: "It is the observation of the consequences of the negligent act and not observation of the act itself that is likely to cause [severe] emotional trauma."[121] The only justification for requiring that the plaintiff observe the tortious act is to limit the number of potential plaintiffs, because the number of people who could witness injuries is significantly greater than those fortuitous enough to see the tortious act.[122] This rule excludes a wide spectrum of claims in which the act is not observed in any manner, or worse, is nonobservable.[123] A limitation on the number of cases can be achieved by erecting distinctions that have more merit than the act-result dichotomy. For example, an alternative limitation can be imposed through more stringent requirements of what constitutes actionable emotional distress. This change would limit the number of claims without the artificiality produced by requiring observation of the tortious act.

If the *Dillon* rule is altered so that observation of the results of the tortious activity would permit recovery, the type of harm that must be observed to meet the *Dillon* requirement necessarily will have to be defined. This definition will have two components. The first concerns the manner in which the harm appears. In *Jansen* the harm to the child was gradual. While the impact upon the mother may have been substantial, from a practical viewpoint no liability should ensue. As the *Restatement (Second) of Torts* notes, there are certain incidental costs to living in society.[124] The pain en-

116. *Id.* at 24, 106 Cal. Rptr. at 885. That contention was unavoidable because she could not point to any "act" of negligence capable of observation.

117. *Id.*

118. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

119. *Id.* at 254–55, 79 Cal. Rptr. at 724.

120. 31 Cal. App. 3d 22, 24–25, 106 Cal. Rptr. 883, 885 (1973).

121. 55 Cal. App. 3d 573, 583, 127 Cal. Rptr. 720, 727 (1976).

122. Referring to the nearly identical legal situation in Great Britain, one commentator made the following conclusion: "The actual decisions in the cases suggest that the [guidelines] are simply designed to provide criteria for selecting a small number of cases for compensation out of the large potential number." P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 81 (3d ed. 1980). Of the cases cited *supra* in note 4, only *Mobaldi*, *Austin*, and *Krouse* presented facts that indicated the plaintiff observed the act as it occurred.

123. For example, the act may be nonobservable in cases concerning medical malpractice in which the tortious conduct is an error of omission rather than a discrete act.

124. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

dured when family members are ill or injured is one of those emotional costs. The law intervenes only when the plaintiff bears an unusual or aggravated burden.[125] *Jansen* held that the observed event had to be sudden and brief.[126] This requirement, for two reasons, is applicable also to the type of harm witnessed. First, a slow deterioration in health is characteristic of the type of harm with which individuals are expected to cope. And second, an element of emotional preparation exists when the injury develops slowly.[127] Thus, compensable shock to the plaintiff will come from the sharp contrast between the healthy victim and the injured victim. A *Dillon* cause of action should not arise when a long period of time transpires between the cognizance of the two extremes.

The second component of the type of harm definition considers the severity of the third party's injury. Consistent with the requirement of a sharp contrast between the healthy victim and the harmed victim, an attempt also should be made to define the nature of the harm sufficient to maintain a cause of action. A requirement of "serious bodily harm or death" is appropriate for the task.[128] The *Restatement (Second) of Torts* uses this term to define the limits of the privilege of self-defense. It can be applied also to characterize the severity of bodily harm needed to meet the requirements of *Dillon*:

> The phrase "serious bodily harm" is used to describe a bodily harm the consequence of which is so grave or serious that it is regarded as differing in kind, and not merely in degree, from other bodily harm. A harm which creates a substantial risk of fatal consequences is a "serious bodily harm," as is a harm the infliction of which constitutes the crime of mayhem.[129]

The definition limits the number of potential plaintiffs in bystander claims and excludes claims based on insubstantial harm caused by the defendant. The harm actually must be serious, not merely perceived by the plaintiff as serious. The defendant's liability comes into issue only when he actually has inflicted serious bodily harm.

The *Dillon* rule has avoided confronting these issues by requiring that the plaintiff observe the tortious act. This fallacious approach cannot be tolerated when other possible means of weighing liability without the infirmities of the current rule exist.

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125. *Cf.* Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (recovery denied for death of unborn child).

126. 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 884 (1973).

127. *See* Laughlin, *The Neuroses Following Trauma*, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY ¶ 1301, at 104–08 (Cantor 1962).

128. *See, e.g.*, Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980):

> The harm we have determined to be worthy of judicial redress is the trauma accompanying the observation of the death or serious physical injury of a loved one. While any harm to a spouse or a family member causes sorrow, we are here concerned with a more narrowly confined interest in mental and emotional stability . . . . We hold that the observation of either death or this type of serious injury is necessary to permit recovery.

Id. at 100, 417 A.2d at 527–28.

129. RESTATEMENT (SECOND) OF TORTS § 63 comment b (1965).

3. *The Timeliness of Observation: When was it observed?*

Dillon requires an observation to be contemporaneous with the tortious event.[130] Thus, when the plaintiff in *Deboe v. Horn*[131] arrived at the hospital several hours after the injury had been caused, the court denied recovery because the observation did not occur within time limits closely connected to the accident.[132] This result is reasonable. Presumably, the plaintiff was aware before she saw her husband that he had been hurt; thus the impact of his injury was not as *direct* as in true bystander cases. She may have had time to prepare herself emotionally for the sight of her injured husband; therefore the shock may not have been wholly unanticipated. A requirement of contemporaneity is useful to some extent, but only because it coincides with other indicia that simultaneously demonstrate the inappropriateness of permitting recovery.

Any utility of a requirement of contemporaneity, however, diminished when courts began to define the subject of observation as the injury-producing event.[133] Contemporaneity has no meaning in this context. Acts are either observed or not. The requirement became one of instantaneous observation. Thus, in *Parsons v. Superior Court*[134] two members of the plaintiffs' family were passengers in the defendant's auto; the plaintiffs were following closely behind. The defendant demolished the car by driving it into a pole. The plaintiffs arrived on the scene immediately thereafter, but did not actually see or hear the accident. Accordingly, the court held that no cause of action could be claimed under *Dillon*.[135] This result illustrates the superfluous nature of the requirement of contemporaneity. It is not truly a part of the *Dillon* test. By requiring the plaintiff to observe the act rather than its results, the court did not need to examine the timeliness of the observation. Any observation after the act necessarily would prevent recovery.

If, however, the subject of observation includes the results of the defendant's act, the time element becomes relevant. If the plaintiff can recover for shock caused by witnessing the resultant injuries, some limits on the time of observation are desirable. *Mobaldi* recognized the need to require a close connection of "perception, time and geography in order to avoid an overly broad scope of liability."[136] Without these limitations, all tortious acts possibly could engender bystander claims if a relative happens to see the injured party at any time after the accident when the injuries are still evident. This result would be contrary to the presumption that bystander claims are justified by their extreme or aggravated nature. The issue of contemporaneity is

130. *See supra* text accompanying note 59.
131. 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971).
132. *Id.* at 224, 94 Cal. Rptr. at 79.
133. *See supra* text accompanying notes 114–29.
134. 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).
135. *Id.* at 512, 146 Cal. Rptr. at 498.
136. 55 Cal. App. 3d 573, 585, 127 Cal. Rptr. 720, 728 (1976).

useful in this situation. The plaintiff's observation of the injuries should be contemporaneous with their inception. This approach is more accordant with the requirements of a direct emotional impact and a contrast in the victim's condition. But without a change in the "what" of observation, contemporaneity has no significant function.

V. CONCLUSION

The *Dillon* rule, like most tenets of law, is neither completely perfect nor totally unjust. However, the negative aspects of the *Dillon* rule, particularly the error in the definition of the subject of observation[137]—the "what"—have overshadowed its positive aspects. The positive aspects of the rule—its admirable formality,[138] its liberal interpretation of the manner of observation,[139] its rejection of the physical manifestations test,[140] and its flexible resolution of the relationship issue[141]—have been impaired by the trend to utilize the act observation rather than the result observation. By rejecting the act and adopting the result approach, the *Dillon* rule would be consistent with the actual manner in which emotional distress is suffered.

With this change judicial or legislative efforts should be made to supply clear definitions of what harm is appropriate to sustain a cause of action and which level of emotional distress is compensable. Reliance on objective criteria would serve better than the current absence of any criteria. Additionally, it will be necessary to limit potential claims to those situations that present a close connection in time, perception, and geography, while recognizing that extreme or aggravated situations also may be worthy of recovery. What follows is an attempt to bring together all the positive aspects and proposed changes discussed above into a workable rule.

(1) Question of law: Does the relationship between the plaintiff and the victim contain the essence of familial or spousal ties?
(2) Question of fact:
  (a) Did the defendant act negligently to cause severe bodily harm or death to the victim?
  (b) Did the plaintiff observe any of the following:
    (i) The development or infliction of serious bodily harm or death;
    (ii) serious bodily harm or death after its occurrence but without material change in condition and location of the victim?
  (c) Did the plaintiff appreciate the severity of the victim's condition at the time of the observance?

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137. *See supra* text accompanying notes 114–29.
138. *See supra* text accompanying notes 66–75.
139. *See supra* text accompanying notes 109–13.
140. *See supra* text accompanying notes 76–91.
141. *See supra* text accompanying notes 95–108.

(d) Did the plaintiff suffer severe emotional distress?
(e) Was the observance of the victim's condition a substantial factor in causing the plaintiff's emotional distress?

This Comment does not contend that this model will resolve all the difficulties encountered in the adjudication of bystander claims. The essential purpose of this Comment has been to demonstrate the inadequacies of the *Dillon* rule and to encourage innovation (by the judiciary or the legislatures considering the implementation of wider bystander liability) to avoid these inadequacies.

John David Burley